THE EVOLUTION OF DUE PROCESS OF LAW IN THE DECISIONS OF THE UNITED STATES SUPREME COURT.

The phrase "due process of law," found in the fifth amendment of the constitution, is the equivalent of the phrase "law of the land," which for so many hundreds of years was one of the bulwarks of English liberty secured by the Magna Charta.[1] That phrase, when inserted in the Magna Charta, and indeed throughout the entire history of English constitutional law, was regarded as a restraint upon the Crown and not upon Parliament. The power to make laws which resided in Parliament remained unlimited, but the power of the Crown in dealing with the life, liberty or property of its subjects, was restrained to action in accordance with the "law of the land," which was understood to be the statutes of Parliament and the common law. However, while there is no suggestion in the old books that the power of Parliament was limited by the Magna Charta, there is a decided current of judicial thought toward the doctrine that the fundamental principles of the common law do curtail within certain limits the power of Parliament.

In Dr. Bonham's Case,[2] Lord Coke first stated the doctrine, which he later endeavored to palliate, as follows:

"It appears in our books, that in many cases, the common law will control acts of Parliament, and sometimes adjudge them to be utterly void: for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void."

This was approved by Lord Hobart in *Day* v. *Savage*,[3] and again reiterated with acquiescence by Chief Justice Holt in *City of London* v. *Wood*.[4] It never, however, became an axiom of English law nor formed the basis of a decision annulling an act of Parliament.

Whether these learned men meant only that the laws of Parliament should, whenever possible, be construed in accord with the common law, as has been argued, is immaterial for our purposes.[5]

[1] Murray's Lessee *v.* Hoboken etc. Co. (1855) 18 How. 272.

[2] (1610) 8 Rep. 118 *a*.

[3] (1615) Hob. 87.

[4] (1698) 12 Mod. 687.

[5] See note in Thayer's Cases on Constitutional Law, 48.

It is enough that the phrases were seized upon by the orators of the American Revolution to justify the doctrine of resistance to and nullification of the laws of England and by continual repetition became doubtless current in this country among all but the Tories, in the broadest sense.[6]

It should also be remembered that the writings of the French humanists and economists were charged with references to natural law and the social compact as the fundamental law of all social life.

The effect of these ideas must have been pronounced and it is therefore not surprising to find that courts which presumed to annul acts of the legislature when in conflict with the constitution, and which were dominated by men who had been familiar with all the phases of the struggle for independence and the arguments used to justify nullification, should also lay down the doctrine that the legislative power was limited, not only by the written constitution, but by the fundamental laws of nature.

At the February term, 1796, of the Supreme Court, Mr. Justice Chase gives vigorous utterance to the doctrine in the following words:

"* * * I hold it as unquestionable that the Legislature of Virginia established, as I have stated, by the authority of the people, was forever thereafter invested with the supreme and sovereign power of the state, and with the authority to make any Laws in their discretion to affect the lives, liberties and property of all the citizens of that Commonwealth, with this exception only, that such laws should not be repugnant to the Constitution or fundamental law, which could be subject only to the control of the body of the nation in cases not to be defined, and which will always provide for themselves." * * *[7]

Shortly thereafter in the case of *Calder* v. *Bull*,[8] the same justice explains fully the reasons for the doctrine:

"* * * I cannot subscribe to the omnipotence of a State legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law of the State. The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence.

[6]See note to Paxton's Case (1761) Quincy's Reports, Appendix 1, 520, and note thereon in Thayer's Cases on Constitutional Law, 48.

[7]Ware *v.* Hylton (U. S. 1796) 3 Dall. 199, 223; see also Vanhorne *v.* Soviance (U. S. 1795) 2 Dall. 304, 310.

[8](U. S. 1798) 3 Dall. 386, 387-8.

The purposes for which men enter into society will determine the nature and terms of the social compact, and as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature and ends of legislative power will limit the exercise of it. * * * There are certain vital principles in our free Republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security or personal liberty, or private property, for the protection whereof the government was established. An act of the legislature (I cannot call it a law), contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. * * *"

That this was not then a universally accepted notion is apparent from Mr. Justice Iredell's vigorous and sarcastic pronouncement in the same case:[9]

"It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government any court of justice would possess a power to declare it so."

The growth of the doctrine continued apace. In case of *Fletcher* v. *Peck*,[10] Chief Justice Marshall rests the court's decision upon two props of which this is one. At pages 135 and 139, the great jurist says:

"It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?"[11]

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"It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either *by general principles which are common to our free institutions*, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the

[9] *Ibid.* 398; note also Gunn *v.* Barry (1872) 15 Wall. 610, 622-3, where the court says: "It is in effect taking one persons's property and giving it to another without compensation. This is contrary to reason and justice and to the fundamental principles of the social compact. But we must confine ourselves to the constitutional aspect of the case." R. R. Co. *v.* County of Otoe (1872) 16 Wall. 667; Pine Grove *v.* Talcott (1873) 19 Wall. 666.

[10] (1810) 6 Cranch 87.

[11] See Satterlee *v.* Matthewson (1829) 2 Pet. 380, 413.

plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void."[12]

In *Terrett* v. *Taylor*[13] Mr. Justice Story announced practically the same doctrine, and based a decision that a grant or title to lands by the legislature is irrevocable upon the doctrine of fundamental law and natural justice as well as upon the Constitution of the United States, and in *Wilkinson* v. *Leland*[14] the same learned justice gives an excellent exposition of the doctrine as follows:

"* * * That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred. * * * We know of no case, in which a legislative act to transfer the property of A to B, without his consent, has ever been held a constitutional exercise of legislative power, in any state in the union. On the contrary, it has been constantly resisted, as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced * * *."

Up to this time, however, the court had not held void a statute simply because of its repugnancy to this doctrine. A number of cases however soon arose in which such an application of the doctrine was made.

The question was brought before the court whether a state legislature could authorize a valid personal judgment against a non-resident without personal service. The first case was an appeal from the Louisiana court, which had refused to recognize such a judgment rendered by the New York court against a Louisianian.[15] Here, of course, the court very properly held that a sovereign was not obliged to recognize any of the acts of a foreign sovereign, except as required by the constitution, which provided that full faith and credit should be given to the "judgments" of sister states. The New York court had not made a real "judgment". The second case of this character presented an entirely different question. The courts of the Territory of Iowa, acting in obedience to a statute, had entered a personal judgment against certain Indians who had not been personally served with process, under which judgment land belonging to the Indians was sold.

[12]See United States *v.* Arredondo (1832) 6 Pet. 691, 737; Charles River Bridge *v.* Warren Bridge (1837) 11 Pet. 420, 573.

[13](1815) 9 Cranch 43.

[14](1829) 2 Peters 627, 657, 658.

[15]D'Arcy *v.* Ketchum (1850) 11 How. 165.

The purchaser commenced a suit of ejectment in the Territorial court against the person holding title from the Indians, which was appealed to the Supreme Court. That court held the judgment under which the lands were sold, having been rendered without personal service of any process of the state, was a nullity.[16] No suggestion is contained in the opinion which reveals the principle upon which the court acted. But the effect of the decision was the nullification without the support of any constitutional provision, of an act of the legislature by one of its own courts, for the Supreme Court in such an appeal is acting merely as the court of highest resort of the territory from whose court the appeal is taken. Must not we conclude that the real basis of the court's decision was the doctrine of fundamental law? In *Pennoyer* v. *Neff*,[17] the court notes the difference between the refusal of the courts of a foreign state to enforce a judgment rendered without service and such refusal by the domestic courts, but states at page 732:

"* * * if the court has no jurisdiction over the person of the defendant by reason of his non-residence, * * * if the whole proceeding, without service upon him or his appearance, is *coram non judice* and void; if to hold a defendant bound by such a judgment is contrary to the first principles of justice,—it is difficult to see how the judgment can legitimately have any force within the State * * *."

The court then proceeds to hold that since the adoption of the 14th amendment, such judgments are clearly invalid in the state where rendered as they amount to a deprivation of property without due process of law.

This doctrine of the fundamental law finds a similar application in 1854, when the court held that a statute of California taxing property temporarily within its jurisdiction was invalid upon these general principles.[18]

A statute taxing vessels plying between points within and without the taxing state, registered without the state and owned by non-residents, was held beyond the taxing power of the state.[19]

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[16]Webster *v.* Reid (1850) 11 How. 437.

[17](1877) 95 U. S. 714.

[18]Hays *v.* Pacific Mail S. S. Co. (1854) 17 How. 596. This case was subsequently, in Morgan *v.* Parham (1872) 16 Wall. 471, explained by the court to be based upon the commerce clause of the constitution, but in the opinion in the Hays Case there is nothing to indicate such to be the fact, and it seems clear that the court had in mind only general principles of fundamental law.

[19]St. Louis *v.* The Ferry Co. (1870) 11 Wall. 423, 430.

"Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void."

Again the court says at page 429:

"It has been said that the power of taxation for the purposes of the commonwealth is a part of all governmental sovereignty and is inseparable from it. It is for the legislature to decide what persons and property shall be reached by the exercise of this function and in what proportion and by what processes and instrumentalities taxes shall be assessed and collected. The authority extends over all persons and property within the sphere of its territorial jurisdiction. When called into activity there can be no limit to the degree of its exercise except what is found in the wisdom of the law-making power *and the operation of those conservative principles which lie at the foundation of all free government.*"

Taxes upon property lying outside of the state to be collected from persons within the state and over whom the state could exercise the power of collection, were held invalid.[20]

In *Erie Railroad* v. *Pennsylvania,*[21] the court held invalid "as beyond the power of the state" a statute construed in that case to compel a foreign railroad corporation to collect for the state the state tax upon the bonds of that railroad held by residents of the state, the collection to be made by withholding the amount of the tax from the interest payment to be made in a foreign state.

It is noteworthy that in all of the cases so far cited the court is setting aside an act of the legislature which endeavors to affect property or persons situated without the territorial jurisdiction of the legislature. These decisions are based upon the ground that the action defeated by them is beyond the physical power of the state. But clearly it is not beyond the power of the state in the sense that a statute attempting to punish a man who was at the time on English soil is beyond the state's power. The state in all the cases had jurisdiction over persons or property which gave it the physical *power* to enforce its will. In the last case cited, the corporation having failed to collect the tax, the state had the *power* to resort to the remedy provided in the statute for such a contingency, *viz.,* a suit against the corporation and a levy on its property within the state. In substance the courts in these cases

[20]Railroad Co. *v.* Jackson (1868) 7 Wall. 262, annulling a tax on foreign railroad corporation with lines within the state upon lines without as well as within the state. State Tax On Foreign-Held Bonds (1872) 15 Wall. 300. State cannot collect from domestic corporation a tax on bonds held without the state by non-residents.

[21](1893) 153 U. S. 628.

have held that the statutes set aside by them have been beyond the *constitutional* power of the legislature. They have acted upon the doctrine that fundamental principles limit the power of the legislature. This is clearly the setting aside of a legislative enactment because of its violation of certain fundamental principles of government.

Another class of cases, however, arose, in which a broader application of the doctrine was made, and in which these decisions heretofore cited reached their culmination. These cases hold that the fundamental law restrains a state legislature from authorizing the issuance of bonds in aid of a private purpose.[22]

In *Cole* v. *La Grange*,[23] the court uses this language:

"The general grant of legislative power in the Constitution of a state does not enable the legislature, in the exercise either of the right of eminent domain or of the right of taxation, to take private property, without the owner's consent for any but a public object. * * * These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject."

It should be noticed that although these last two cases were decided after the adoption of the Fourteenth Amendment, the court based its decision upon the doctrine of fundamental law and not upon the due process of law clause of the Amendment. Since the *Cole Case,* the court has never relied upon this doctrine alone to nullify a state or national statute, although it has several times referred to the doctrine.[24]

"But we need not have recourse to this natural equity, nor is it necessary to look through the Constitution to the affirmations lying behind it in the Declaration of Independence, for, in this Fifth Amendment, there is stated the exact limitation on the power of the government to take private property for public uses."

Pollock v. *Farmers' Loan & Trust Co.,* Harlan, *J.,* dissenting:

"If it were true that this legislation, in its important aspects and in its essence, discriminated against the rich, because of their wealth, the court, in vindication of the equality of all before the law, might well declare that the statute was not an exercise of the power of taxation, but was repugnant to those principles of natural

[22]Loan Assn. *v.* Topeka (1874) 20 Wall. 655, city bonds authorized by state legislature and used in aid of a private manufacturing company held invalid. Parkersburg *v.* Brown (1882) 106 U. S. 487.

[23](1884) 113 U. S. 1, 6.

[24]See Monongahela Navigation Co. *v.* U. S. (1892) 148 U. S. 312, 325.

right upon which our free institutions rest, and, therefore, was legislative spoliation under the guise of taxation. * * *"[25]

That there were those who denied the existence in the judiciary of any such power as that exercised by the Supreme Court as above set forth, is amply attested by numerous *dicta*.[26]

Possibly this vigorous dissent prevented the further extension of a doctrine of such ill-defined limits. A more cogent reason, however, for the discarding of this doctrine since the early 70's may be found in the development which the due process clause of the Fourteenth Amendment underwent, resulting in a usurpation of the field theretofore occupied by the doctrine of fundamental law.

While the court was thus elaborating the doctrine of fundamental law, the phrase "due process of law" was developing very slowly. Contained in the Fifth Amendment and limiting action by the federal government only, few cases arose calling for its application.

As has been pointed out the parent phrase in the Magna Charta limited the power of the Crown and not the power of Parliament. It was aimed to guarantee that no one would be deprived of life, liberty, or property except by the procedure and in conformity with the laws established by Parliament. Was the phrase in the federal constitution to be given a like scope; or should it be held to limit both the executive and Congress in using or prescribing novel methods of procedure only, and to allow individuals to be deprived of their life, liberty and property upon any terms or for any reasons so long as the usual methods of procedure were adhered to, or finally should it be so construed as to protect the individual against any arbitrary and unreasonable exercise of power by the government, in which case it would enable the court to set aside any legislation which it felt to be particularly obnoxious. These were the problems confronting the court.

Prior to the passage of the Fourteenth Amendment the decisions construing the phrase were few and most of them concerned the validity of novel methods of procedure. But the court

[25](1894) 158 U. S. 601, 674-5; Bartemeyer *v.* Iowa (1873) 18 Wall 129, 132; Knowlton *v.* Moore (1899) 178 U. S. 41, 109; McCray *v.* U. S. (1903) 195 U. S. 27, 62.

[26]See 1, Kent Comm. (12th ed.) 447; Cooley, Const. Lim. (6th ed.) 200; People *v.* Simeon Draper (1857) 15 N. Y. 532; Bertholf *v.* O'Reilly (1878) 74 N. Y. 509; People *v.* Gilson (1888) 109 N. Y. 389; Eakin *v.* Raub (Pa. 1825) 12 S. & R. 330; Thorpe *v.* Rutland & A. R. R. Co. (1854) 27 Vt. 140; State *v.* Wheeler (1856) 25 Conn. 290; Fifield *v.* Close (1867) 15 Mich. 505.

made use of various expressions indicating that it was ready to construe the phrase in its broadest sense.

As early as 1819, Mr. Justice Johnson defined the parent phrase "law of the land" in the Maryland constitution as follows:[27]

"* * * As to the words from Magna Charta, incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: That they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice. * * *"

Here the learned justice defines the phrase in the broadest sense.

However, as the case concerned the validity of a statute providing in specified cases for a summary *procedure* for collecting certain debts, and as the decision turned upon the question of whether this *procedure* was proper, the quotation can hardly be said to satisfactorily establish more than that the phrase limited the power of the legislature to adopt and prescribe novel methods of procedure.

In 1877, the court stated:[28]

"* * * It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A, shall be and is hereby vested in B, would, if effectual, deprive A of his property without due process of law, within the meaning of the constitutional provision."

This is a clear recognition of the broader meaning of the phrase and one almost identical with the meaning theretofore given to the doctrine of fundamental law. The court was, however, still deeply imbued with the notion that "due process of law" had reference to the *procedure* by which a person might be deprived of life, liberty and property rather than to the power of the state to arbitrarily deprive a person of such rights, since at page 105, it defines the phrase as follows:

"It may violate some provision of the state Constitution against unequal taxation; but the Federal Constitution imposes no restraints on the States in that regard. If private property be taken

[27]Bank of Columbia *v.* Okely (1819) 4 Wheat. 235, 244.

[28]Davidson *v.* New Orleans (1877) 96 U. S. 97, 102. See also Murray's Lessee *v.* Hoboken Co. (1855) 18 How. 272; McMillan *v.* Anderson (1877) 95 U. S. 37; Pearson *v.* Yewdall (1877) 95 U. S. 294 which held a certain procedure to be due process.

for public uses without just compensation, it must be remembered that, when the fourteenth amendment was adopted, the provision on that subject, in immediate juxtaposition in the fifth amendment with the one we are construing, was left out, and this was taken. It may possibly violate some of those principles of general constitutional law, of which we could take jurisdiction if we were sitting in review of a Circuit Court of the United States, as we were in *Loan Association* v. *Topeka* (20 Wall. 655). But, however this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issue affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case. This was clearly stated by this court, speaking by the Chief Justice, in *Kennard* v. *Morgan* (92 U. S. 480), and, in substance, repeated at the present term, in *McMillan* v. *Anderson* (95 id., 37)."

This definition is particularly forceful, since Mr. Justice Bradley dissented upon the expressed ground that the court's definition of the phrase was limited as above stated, and since the appellant's contention was based upon the broader conception of the phrase.

After the passage of the 14th amendment a new era in the history of the phrase begins. The doctrine of fundamental law was a vague and unstable doctrine for the court to rest its decisions upon.

The court had theretofore given expression to the notion that "due process of law" was not merely a safeguard against novel methods of procedure. What more natural than that the doctrine of fundamental law should give way to the restriction against the deprivation of life, liberty and property, without due process of law, and this is precisely what happened.

One of the doctrines of the fundamental law had been that A's property could not be taken from him and given to B, and this the court now held to be prohibited by the due process of law clause of the 14th amendment.[29]

[29]Noble *v.* Union River Logging Co. (1892) 147 U. S. 165, order of Secretary of Interior revoking R. R.'s right of way over public land; St. Louis etc. Ry. Co. *v.* Gill (1898) 156 U. S. 649; Long Island Water Supply Co. *v.* Brooklyn (1896) 166 U. S. 685, 694-5; Smyth *v.* Ames (1897) 169 U. S. 466, a law fixing maximum rates which did not yield a profit; Covington, etc. Co. *v.* Sandford (1896) 164 U. S. 578 *iden;* Mo. Pac. Ry. Co. *v.* Nebraska (1909) 217 U. S. 196, statute compelling railroad to allow individuals to build grain elevators on its right of way with no provision for determination that they were reasonably required; Mo. Pac. Ry. Co. *v.* Nebraska (1896) 164 U. S. 403, railroad commissioners ordered railway to permit private person to build elevator on its right of way with no provision for compensation; Louisville etc. Co. *v.* Stock Yards Co. (1908)

Later in the case of *Norwood* v. *Baker,* the court holds that it is a denial of due process of law to take property without compensation for the use of a street even under the guise of an assessment for a local improvement.[30]

One of the doctrines of the fundamental law had been that a state can not tax a resident upon property situated in another state, and this also was now held to be within the prohibition of the fourteenth amendment.[31]

Another example equally striking, of the usurpation of the field occupied by the doctrine of fundamental law by the clause "due process of law" is found in the nullification of personal judgments rendered pursuant to state statutes, without personal service on the defendant within the state. Prior to the passage of the 14th amendment, as has been pointed out, this result was reached upon the doctrine of fundamental law; but since the ratification of that amendment, the court has called to its aid the "due process" clause of the constitution, and has not referred to the doctrine of fundamental law.[32]

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212 U. S. 132, statute forcing railroads to permit its cars to be used by other railroads; Prentis *v.* Atlantic Coast Line (1908) 211 U. S. 210, a statute imposing a confiscatory rate upon a railroad company; Cleveland Co. *v.* Cleveland (1906) 204 U. S. 116, statute authorizing A Co. to take property belonging to B. Co.

[30](1898) 172 U. S. 269. It is submitted that this case is not inconsistent with the cases sustaining the levy according to the front foot rule of local assessments upon property particularly benefitted by improvements. In all these the assessment has been levied for paving or repairing roads and has been imposed upon a number of property owners, who have been personally benefitted, so that the burden has been widely distributed and has not been excessive. On the other hand, in the Baker case, a cross street 300 feet long was opened through Mrs. Baker's property, part of which was condemned for the work, and the cost of this property plus the cost of the condemnation proceedings were all in turn levied upon Mrs. Baker under a local assessment of law. It could not be denied that in substance this was taking Mrs. Baker's property for the road without compensating her. While it may be that there is no logical difference between this and the other cases, there is a great difference in degree, and after all, most problems of constitutional law, especially of the application of the clause "due process of law," are questions of degree.

[31]Louisville etc. Ferry Co. *v.* Kentucky (1902) 188 U. S. 385; D. L. & W. R. R. Co. *v.* Pennsylvania (1904) 198 U. S. 341; Union Transit Co. *v.* Kentucky (1905) 109 U. S. 194; C. B. & Q. R. R. *v.* Babcock (1906) 204 U. S. 585, 592; Buck *v.* Beach (1906) 206 U. S. 392; Western Union Telegraph Co. *v.* Kansas (1909) 216 U. S. 1, 38; see also Selliger *v.* Kentucky (1908) 213 U. S. 200; Ayer & Lord Co. *v.* Kentucky (1905) 202 U. S. 409, reaching same result without specifying which clause of the constitution had been violated. See Allgeyer *v.* Louisiana (1896) 165 U. S. 578, holding that it is a deprivation of property without due process of law for a state to prohibit making of contracts of insurance outside of the state.

[32]Roller *v.* Holly (1899) 176 U. S. 398, non-resident personally served; Dewey *v.* Des Moines (1898) 173 U. S. 193, non-resident not personally served.

Akin to these cases is the case of *Scott* v. *McNeal*,[33] holding that an administration of the estate of a person supposed because of long absence to be dead is invalid as a deprivation of property without due process of law if the supposed decedent be really alive.

So far as can be ascertained since the 14th amendment began to be commonly called upon as the barrier against harsh legislation, no cases similar to *Loan Association* v. *Topeka* have arisen before the Supreme Court for adjudication; and consequently the 14th amendment has never been applied to this doctrine of the fundamental law, but except for this, every other doctrine of the fundamental law has since the adoption of the 14th amendment been divorced from the fundamental law theory and brought under the protecting wing of the due process of law clause.

This at once raises the question, is the scope of the "due process" clause apart from its guarantee against novel procedure limited by that of the fundamental law? In other words, will the court set aside legislation as being in conflict with this clause of the constitution, only if it be so arbitrary and obnoxious that it violates the fundamental notions of government.

There are but four decisions of the Supreme Court setting aside statutes because of their conflict with the due process clauses of the 5th or the 14th amendment which do not clearly fall within one or other of the doctrines of the fundamental law. These are: *L. S. & M. S. Ry. Co.* v. *Smith*,[34] *Dobbins* v. *Los Angeles*,[35] *Lochner* v. *New York*,[36] and *Adair* v. *U. S.*[37]

In the *Smith Case* the Court held that after the Legislature had once established the maximum rates to be charged by railroad corporations, it could not thereafter prescribe special rates for mileage books, as that would interfere with the right of the railroad to manage its business. The decision was based upon the due process clause of the 14th amendment.

This is a most extraordinary decision. It can hardly be doubted that had the Legislature, before fixing general maximum rates, undertaken to fix the price at which mileage books should be sold, the Legislature would have been sustained. Railroad Commissions have been making special rates for railroads without interference

[33](1893) 154 U. S. 34.
[34](1898) 173 U. S. 684.
[35](1904) 195 U. S. 223.
[36](1904) 198 U. S. 45.
[37](1907) 208 U. S. 161. See also St. Louis I. M. and S. Ry. Co *v.* Wynne (1912) 224 U. S. 354.

by the courts while such rates were reasonable. Certainly this decision goes far beyond the doctrine of fundamental law; but it is a very great question whether the decision is sound and will be followed by the court, and consequently it forms an insecure foundation for any generalizations.

In *Dobbins* v. *Los Angeles,* the City of Los Angeles which in August had prescribed a restricted district within which gas works could be constructed and operated and on November 22nd had given the plaintiff-in-error a license to build a gas plant within that district, on November 25th changed the limits of the restricted district so as to exclude the tract upon which the plaintiff-in-error had already begun building; and later endeavored to stop the continuance of building operations by the plaintiff-in-error. It appeared that the tract on which the plaintiff-in-error was building was in the midst of a section given over to manufacturing, that no change in the character of the locality had taken place between August and November 25th; and it was alleged that the City's effort to prevent the plaintiff-in-error from building was inspired by the existing gas monopoly. The Court held that this action of November 25th changing the limits of the district within which gas works might be constructed so as to exclude the part in which the plaintiff-in-error was building was a taking of property without due process of law and hence invalid.

This case shows that the Supreme Court will limit the exercise of the police power when exercised in too arbitrary a fashion; but the fact that it is the only case except perhaps the *Lochner and Adair Cases* in which such action has been taken, indicates the extreme conservatism of the Court in expanding the due process clauses of the Constitution.

The *Lochner Case* has been severely criticized, weakened very decidedly by the case sustaining the Oregon Statute limiting the hours of labor for women; and is consequently of doubtful authority. It does however mark a disposition to move one step beyond the doctrine of fundamental law as it has been enunciated in the past. Of course, it is possible that the court would have reached the same result without the aid of the 14th amendment upon the theory that arbitrary interferences with the freedom of contract and the right to work, were violations of the social compact or the fundamental principles of society and government. It is hardly probable, however, that without the sanction of the 14th amendment the court would have reached the conclusion of the *Lochner*

Case. Much the same is true of the *Adair Case.* These cases therefore seem to mark a development of the "due process clause" beyond the fundamental law.

The fact however that, though a large number of cases come before the supreme court in which statutes are attacked as conflicting with this clause in the constitution, these are the only decisions of the court unfavorable to the validity of the statutes, is strong evidence of an extreme reluctance on the part of the court to extend the scope of the amendment.

Nor is there any evidence that the court will in the future add further extensions to the doctrine. During the past two years there has been a marked tendency to retrench, noticeable particularly in the case involving the validity of the Oregon law limiting the hours of labor for women. It seems reasonable therefore to believe that there is nothing contained in the fourteenth amendment as expounded by the Supreme Court of the United States which will interfere with the power of the legislature, state and national, to adopt soundly progressive legislation for the protection of its citizens.

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